October 11, 2006

TO: Members of the Washington State Wine and Beer Three Tier System Review Task Force

FROM: Jeff Becker

President, The Beer Institute

Re. Task Force recommendations on issues before the United State Court of Appeals for the 9<sup>th</sup> Circuit

Representatives of the Beer Institute have been following the work of the Three Tier System Task Force with great interest over the last several months. Our members produce or import over 90% of the beer consumed in Washington State, and they have invested substantially in their respective distribution systems in order to comply with existing state law.

The future of the distribution structure in Washington State is already uncertain given the pending federal litigation initiated by Costco. We are very concerned that any Task Force recommendations at this time to change statutes that are under review before the United States Court of Appeals for the 9<sup>th</sup> Circuit will present even greater legal uncertainty for our members' wholesalers, and not provide members of the legislature with the full benefit of the appellate court's decision, which may differ from that of Judge Pechman.

We appreciate the Task's Force's desire to satisfy its legislative mandates by the beginning of the 2007 legislative session. When the legislature created that deadline in late March 2006, however, the federal district court had not yet ruled on the Costco case and, of course, an appeal had not yet been filed. Substantive and procedural issues in the litigation are still being developed and the first appellate briefs will not be filed with the Court of Appeals until November. Therefore, in the interest of best serving the legislature, we believe the Task Force should inform the legislature of the litigation status and seek an extension of time to provide recommendations following a decision from the appellate court.

While the appellate litigation continues, we also respectfully ask that the Three Tier System Task Force refrain from making any recommendations to amend or repeal provisions of Washington law that have been challenged in the ongoing litigation with Costco. Washington State and the Washington Beer and Wine Wholesalers have been developing their appellate arguments for submission to the 9<sup>th</sup> Circuit Court of Appeals. Any formal recommendations at this point in the process could undercut those efforts, which are intended to uphold existing Washington statutes.

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As a matter of principle, the existing enactments of the Washington Legislature should be respected unless and until the appellate process is completed in the federal court system. It would seem very strange that a group of state officials, industry representatives, and civic leaders funded by the legislature would take positions that could harm the state's position in litigation over the viability of properly enacted state laws. The state is also exposed to substantial liability in the litigation. Members of the legislature would surely appreciate the reason and the wisdom of delaying Task Force recommendations on the statutes under federal judicial review.

On a practical level, recommendations made by the Task Force should be consistent with the decision of the Court of Appeals. Any amendments to state law made necessary by the litigation should be developed to withstand further legal challenges. Otherwise state regulators, industry members, investors, and consumers face continued uncertainty over Washington State's alcohol beverage regulatory system.

Again, we respect the work that has been done to date by the Task Force, and urge that it continue its efforts on issues unrelated to the litigation. We also recognize that the course of events has been very difficult to predict. When a final decision is rendered by the 9<sup>th</sup> Circuit, the extensive background and deliberative approach taken by the Task Force will facilitate prompt additional guidance if further changes in State law are necessary. At this point in time, however, we ask that the Task Force refrain from making any recommendations on the issues being appealed to avoid damaging the position of the State and the beer wholesalers.